Supreme Court, U.S.
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No. 97-1430

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SCANDINAVIAN HEALTH SPA, INC.,

Petitioner,

v.

ANDREA FRANKLIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER A DISTRICT COURT'S THOROUGHLY REASONED FEE AWARD TO A PREVAILING TITLE VII PLAINTIFF, AFFIRMED BY THE COURT OF APPEALS BECAUSE IT FOUND THE CHALLENGE TO IT SO LACKING IN MERIT THAT IT DID NOT "WARRANT DISCUSSION," PRESENTS A QUESTION REQUIRING THE EXERCISE OF THE COURT'S SUPERVISORY POWER TO REVIEW FOR ABUSE OF DISCRETION THE DETERMINATION THAT CONGRESS DID NOT INTEND TO LIMIT FEE AWARDS TO A PROPORTION OF MONETARY RECOVERY, THEN LIMITED BY TITLE VII TO BACKPAY.

A. Whether A District Court Abuses Its Discretion By Awarding Fees For Services Rendered After A Victim Of Unlawful Discrimination Rejects A Settlement Offer For Far Less Than Backpay Recovered At Trial Plus Fees Accrued Through The Date Of The Offer.

B. Whether A District Court Abuses Its Discretion By Awarding Fees Limited To Time Spent Successfully Establishing Title VII Claims For Sexual Harassment And Discriminatory Demotion Which Yielded Both Declaratory Relief And Equitable Backpay When The Operative Facts Were Conceded Below To Be "Intertwined And Overlapping" With An Unsuccessful Constructive Discharge Claim.

C. Whether A District Court Abuses Its Discretion By Awarding Fees Which Compensate For Time Necessarily Incurred Because Defendant Unreasonably And Exorbitantly Increased The Cost Of Litigation By Conducting Excessive Discov-

ery, By Injecting Groundless Issues And By Greatly Expanding The Scope Of The Trial In An Apparent Effort To Exhaust The Prevailing Plaintiff's Resources.

Page

TABLE OF CONTENTS

Questions Presented i

Statement Of The Case 1

1. Proceedings In the District Court 1

2. The District Court Fee Proceedings 3

3. Proceedings Before the Court of Appeals 5

Reasons Why The Writ Should Be Denied 6

Argument 6

A. No Avoidable Fees: Respondent Rejected Patently Unreasonable Settlement Offers Outside the Scope of Rule 68 8

B. No "Long-shot" Claims: Petitioner Litigated and Prevailed on a Single Case and Controversy for Sexual Harassment and Discriminatory Demotion Under Which Monetary Relief Was Limited by Statute to Backpay 12

C. The Court of Appeals Properly Reviewed the Fee Award Reasonably Adjudicated by the District Court Under a Properly Stated Rule of Law 13

D. Petitioner Seeks to Undermine Clear Congressional Intent and Settled Case Law Governing Fee Awards in Title VII Claims for Backpay 15

Conclusion 17

Appendix – Petitioner's Offer of Settlement (letter dated 11/11/93) 1a

Page

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Company v. Moody, 422 U.S. 405 (1975) 15

City of Riverside v. Rivera, 477 U.S. 561 (1986) 1, 7, 14

Evans v. Jeff D., 475 U.S. 717 (1986) 10, 11

Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*

Marek v. Chesney, 473 U.S. 1 (1985) 6, 8, 9, 10, 11

Statutes:

42 U.S.C. §1983 16

42 U.S.C. §2000e *et seq.* ..... *passim*

Rules:

Fed. R. Civ. P. 5 9

Fed. R. Civ. P. 68 ..... 9, 10

Fed. R. Ev. 403 9

STATEMENT OF THE CASE

The petition for certiorari rests upon false premises, and presents an issue unlikely to recur. It inaccurately contends that respondent rejected a reasonable settlement offer, and that respondent pursued unrelated long shot claims to unreasonably increase her fee claim. Stripped of its false premises, the petition seeks only to enmesh the Court in further review for abuse of discretion of a routine attorney's fee calculation. Petitioner suggests that in reviewing the exercise of discretion below, the Court overturn *City of Riverside v. Rivera*, 477 U.S. 561 (1986), to impose a rule of proportionality to fee calculations in civil rights damage litigation. But this case is not and never was a civil rights damage action; it arose under provisions of Title VII of the Civil Rights Act of 1964, since amended, which limited monetary relief to equitable backpay awards. The Court has never suggested that Title VII fee awards be limited to a proportion of backpay. With the passage of the Civil Rights Act of 1991, victims who like respondent suffered intentional discrimination are no longer limited to recovering backpay; thus, the questions presented in this litigation are unlikely to recur. A magistrate, the District Judge, and the Court of Appeals have all examined the record, and applying standards established in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and refined in the many decisions which have followed in its wake, have resolved the fees due. Plainly stated, there is no substantial question presented for review.

1. Proceedings in the District Court.

Petitioner intentionally discriminated against respondent by subjecting her to an abusive and oppressive work environment because of her gender, and demoted her

because of her gender. She eventually resigned, and sued under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. seeking backpay, injunctive and declaratory relief. Because section 706(g) of Title VII then limited monetary relief to equitable backpay, respondent demanded only backpay in amounts conforming to proof. Although respondent also asserted claims under state law against petitioner and other defendants, she voluntarily dismissed those claims early in the litigation. From its inception through trial, respondent's claim was straightforward—she claimed that she was harassed and demoted because of her gender, and that the combination of the harassment and demotion constituted a constructive discharge.

Fifteen months after respondent filed suit, petitioner offered by letter which appears as the appendix to this brief to settle her claims for a single lump sum payment of $17,500. By that date, respondent had already incurred substantial fees and expenses in extensive discovery; her fee application reflects expenditures for fees and expenses in excess of $45,000 through the date of the settlement offer. Respondent quite reasonably rejected a settlement offer which would have netted her a negative recovery, leaving her worse off than before suit was filed. Petitioner never filed an offer of judgment, and no other settlement offers appear in the record of the courts below.

Petitioner conducted an unnecessary, expensive, and time consuming but unsuccessful defense, greatly complicating what began as relatively simple litigation. Petitioner insisted without foundation that respondent's demotion was only a voluntary transfer to a lower paying position, that respondent was unproductive, and that respondent had not been subjected to a hostile work

environment. Petitioner noted twelve separate depositions, some of which lasted for two days. Contesting every issue, petitioner undertook a "scorched earth" defense, forcing respondent to address the many unsubstantiated issues it unreasonably injected into this litigation. Petitioner succeeded only in transforming what began as a simple lawsuit into an unnecessarily complex five day bench trial.

Respondent prevailed at trial; the District Court entered judgment for her after finding that petitioner intentionally discriminated against her because of her gender by harassing her and demoting her. The judgment awarded respondent equitable relief—backpay from the date of her demotion through the date of her resignation. Because it concluded that the sexual harassment and demotion were insufficient to constitute a constructive discharge, the District Court declined to award respondent additional equitable relief, concluding that her backpay accrual terminated with her resignation.

2. **The District Court Fee Proceedings.**

Respondent sought and obtained as additional relief the reasonable attorney's fee to which she was entitled. Fee proceedings were straightforward, conducted before a magistrate under the framework established in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Respondent submitted a fee application with supporting affidavits from which she eliminated all time and expenses discretely spent on her voluntarily dismissed claims and her constructive discharge claims. Petitioner filed an opposing memorandum, but did not request an evidentiary hearing. The magistrate expressly found the fee application to be reasonable, noting that the operative facts relevant to the several claims were "overlapping and intertwined. . . ."

(Petition for Certiorari, Appendix C, at 12a). Responding to arguments repeated here, the magistrate observed: "While the requested fee appears high, it does not seem excessive *due to the numerous depositions completed before trial, the numerous issues which went to trial, and the degree to which defendants defended the case.*" (Petition for Certiorari, Appendix C, at 13a)(emphasis added). Accordingly, the magistrate recommended a fee of $168,978.50.

The District Court reviewed de novo the record before the magistrate, and entered an order granting the recommended fee. Judge Marcus stated:

> The central contention raised by defendants is that the "lodestar" figure should be adjusted downward because plaintiff succeeded only on certain claims and was awarded only a portion of her requested damages. As the Magistrate Judge noted, and indeed as this Court observed in the course of the bench trial, operative facts relevant to several of the claims were plainly intertwined and overlapping. Defendants' suggestion that the Court should attempt to dissect the interlocking pieces of evidence is unavailing here. We are satisfied that the fee calculus has excluded the excessive, redundant, and otherwise unnecessary. Plaintiff's claims were based upon a central core of facts. She successfully litigated whether a sexually hostile work environment existed and she successfully proved that she was discriminatorily demoted. Under the particular facts and circumstances of this case, we are convinced that this "lodestar" fee is both fair and reasonable. The labor of plaintiff's counsel ultimately resulted in successfully proving much of the core facts of the case, secured a personal damage award,

and vindicated clear congressional policy against discriminatory work practices.

(Petition for Certiorari, Appendix B, at 5a)

3. **Proceedings Before the Court of Appeals.**

Reprising its trial strategy, petitioner launched a broad based but unsuccessful challenge on appeal to virtually every aspect of the merits of the judgment below and the fee award, submitting a 55 page brief in support of its appeal. Petitioner devoted only the last *four and a half pages* to its challenge to the fee award, conceding that "*the district court correctly noted that the operative facts relevant to Franklin's claims were intertwined and overlapping.*" Brief of Petitioner before the United States Court of Appeals, at 51 (emphasis added). Despite its concession, petitioner advanced two arguments below: that fees were excessive compared to the monetary recovery, and that fees should be denied because respondent refused a settlement offer which would have produced a negative net recovery. During oral argument, petitioner never discussed the fee award.

The Court of Appeals affirmed by opinion, noting that petitioner's cursory challenge to the fee award was among several arguments which did not "warrant discussion." (Petition for Certiorari, Appendix A, at 21). The Court of Appeals awarded Respondent a reasonable attorney's fee for appeallate proceedings, and remanded the determination of that award to the District Court. Respondent has sought an award of $33,750 for proceedings before the Court of Appeals; that application remains pending.

REASONS WHY THE WRIT SHOULD BE DENIED

The Petition for Certiorari should be denied for four reasons:

1) Petitioner Made Only Patently Unreasonable Confidential Settlement Offers Which Were Inadequate Both In Form and Content To Curtail Fee Accrual Under Rule 68.

2) Petitioner Conceded Below That Respondent's Successful and Unsuccessful Backpay claims Arose From a Common Core of Overlapping and Intertwined Facts, Foreclosing Its Argument, Unsupported by the Record, That Respondent Pursued Unrelated "Long Shot" Claims.

3) The Court of Appeals Properly Reviewed the Fee Award Reasonably Determined by the District Court under a Properly Stated Rule of Law, Taking into Account Petitioner's Excessive and Unnecessary Litigation Tactics Which Account for the Substantial Time Spent.

4) Limiting Fee Awards to a Proportion of Backpay When, by Statute, Relief Was Limited to Backpay Is Contrary to Clear Congressional Intent Under Title VII And Its Twin Goals of Eradicating Discrimination While Making Whole Its Victims, And Presents an Issue Unlikely to Recur.

ARGUMENT

Beginning with *Hensley v. Eckerhart*, 477 U.S. 561 (1986), the Court established a well understood and workable system for determining the fee due plaintiffs who prevail in claims under Title VII, integrating Rule 68 into that calculus through *Marek v. Chesney*, 473 U.S. 1

(1985).[1] Each of the courts below—the magistrate judge, the District Judge, and the Court of Appeals—followed that system. Both the magistrate judge and the District Judge faithfully and independently applied *Hensley* to calculate a reasonable fee due following a successful suit under Title VII which established two separate claims—unlawful sexual harassment and an intentionally discriminatory demotion. The Court of Appeals reviewed the District Court's exercise of discretion, found no abuse, and affirmed, noting that petitioner's cursory challenge to the fee award presented no issue which "warrants discussion."

Contrary to the petition, the Court of Appeals was correct. Petitioner conceded below that the claims advanced by plaintiff were "interlocking and intertwined," and both the magistrate judge and District Judge independently found them to be so intertwined as to defy separation. Fees were substantially greater than plaintiff's recovery for two reasons—petitioner unreasonably inflated the cost and duration of litigation through excessive discovery and the introduction of extraneous issues into the litigation, producing a five day trial, and petitioner violated Title VII before the effective date of the Civil Rights Act of 1991, foreclosing an otherwise inevitable substantial award of compensatory and punitive damages.

Petitioner's argument that the courts below misapplied *Hensley* misses the mark for three reasons: 1) it rests upon a mischaracterization of proceedings below; 2) when properly presented, the petition seeks only to employ the resources of this Court to review the trial

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[1] The Court reaffirmed Hensley in *City of Riverside v. Rivera*, 477 U.S. 1 (1986), and has applied it consistently in every fee dispute before it.

court's exercise of discretion, and 3) it advances a proposed rule of proportionality to frustrate congressional intent under a statute which then limited monetary relief to backpay. Because *Hensley* and *Marek* work and work well, because the courts below properly followed them under a statute which then restricted monetary relief to backpay, and because the Civil Rights Act of 1991 forecloses the recurrence of proportionality disputes in claims for intentional discrimination, the petition should be denied.

Petitioner mischaracterizes the record below, failing to account for the role of its own litigation tactics in greatly increasing the cost of this litigation. Properly presented, the record below establishes the reasonableness of the fee award. We address the mischaracterizations in turn.

A. No Avoidable Fees: Respondent Rejected Patently Unreasonable Settlement Offers Outside the Scope of Rule 68.

Months after the litigation began, petitioner made the single offer to settle this litigation which appears in the record below, offering a lump sum payment of $17,500 by letter reproduced as an appendix to this brief. Petitioner made its offer in plain and unambiguous language through experienced counsel, well aware that by that time in the litigation, respondent had necessarily incurred much more than that sum in litigation costs and fees. The courts below found that at the time of the offer, respondent had already reasonably incurred fees and expenses in excess of $45,000.00. Respondent rejected the offer because it would have yielded a negative net recovery. Had respondent accepted she would have recovered $17,500 minus $45,000—a balance of negative $27,500 for enduring sexual harassment and a discrimina-

tory demotion. Respondent quite reasonably rejected an offer which left her worse off than if she had not filed suit.

The district court properly disregarded the rejected offer for two reasons: 1) Petitioner elected not to make an offer of judgment under Rule 68, and 2) even applying the standards of Rule 68, the offer was ineffective to terminate the fee accrual because it was far less than the sum of accrued fees and petitioner's recovery.

As the master of its offer, petitioner was free to choose both its form and its terms. By choosing confidential correspondence rather than an offer of judgment, petitioner deliberately elected to forego the benefits Rule 68 potentially offers. Rules 68 and 5 require the service and filing of an offer of judgment. By imposing a measure of formality, the rules assure that the timing, terms, acceptance and expiration of an offer of judgment are immediately ascertainable. By contrast, confidential settlement discussions between parties require reconstruction of events based upon evidence generally inadmissible under Rule 408 of the Federal Rules of Evidence; that reconstruction can generate satellite litigation over the precise course, context, and content of the negotiations. Petitioner's invitation to treat confidential settlement proposals as the functional equivalent of an offer of judgment should be rejected; it seeks improperly to rewrite through litigation the Federal Rules of Civil Procedure.

Even were the Court to treat petitioner's settlement offer as equivalent to an offer of judgment, *Marek v. Chesney*, 473 U.S. 1 (1985) makes it ineffective to stop the accrual of fees. Rule 68 contemplates "that the offer be one that *allows judgment to be taken against the defendant for both the damages caused by the challenged*

conduct and the costs then accrued" 473 U.S. at 6 (emphasis in original). *Marek* permits lump sum offers under Rule 68 to encourage settlements; they permit a defendant to control its total exposure in its offer, and for that reason are the norm: "If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers." Id. *See also Evans v. Jeff D.*, 475 U.S. 717, 736-737 (1986) ("a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open, thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants.")

Marek explains the obligation a lump sum offer imposes upon a plaintiff; it requires the plaintiff to estimate both damages, and costs then accrued, including a reasonable fee for services through the date of the offer. "A reasonable determination whether to accept the offer can be made by simply adding these two figures and comparing the sum to the amount offered." 473 U.S. at 7.

Petitioner offered $17,500 to settle, and claims later to have offered $24,000. The trial court found that respondent had already incurred costs and fees in excess of $45,000 by the date of the one offer of record, and twice that by the alleged second offer, which when added to her trial recovery, greatly exceed the rejected offer. Accordingly, the offer was woefully insufficient to trigger Rule 68's cost shifting provisions.

In a transparent effort to avoid *Marek*, petitioner would shift to respondent responsibility for the terms of its inadequate offer by punishing her for failing to inquire whether the offer was inclusive of fees and costs accrued. Petitioner's argument is meritless; it was the master of its offer, represented by experienced counsel,

and knew well how to communicate an offer which would empower the court to determine and award a reasonable fee. Respondent rejected the offer because it was both unambiguous and inadequate. Petitioner's argument that respondent should have inquired into whether the offer would empower the court to determine fees is simply disingenuous—nothing in the offer reserved any power to the trial court. *See Evans v. Jeff D.*, 475 U.S. at 742 ("Thus far, the Legislature has not commanded that fees be paid whenever a case is settled.") Moreover, petitioner's argument is contrary to *Marek's* explicit instruction to assess the offer by summing estimated costs accrued and damages. Petitioner spoke through its offer with unmistakable clarity, and is responsible for its choice of terms.

Petitioner compounds its error through its assertion that respondent rejected a second offer shortly before trial. Petitioner did not make that assertion before either of the courts below, and the record contains no evidence of that offer. Moreover, coming as it did on the eve of trial, the asserted offer of $24,000 suffered from the same defect as the earlier offer which appears in the record—it was for substantially less than petitioner's recovery as defined by *Marek*—reasonable fees accrued plus backpay. The Court should disregard it because it was not presented below, because it is outside the record, and because it makes no difference under *Marek*.

B. No "Long-shot" Claims: Petitioner Litigated and Prevailed on a Single Case and Controversy for Sexual Harassment and Discriminatory Demotion Under Which Monetary Relief Was Limited by Statute to Backpay.

Petitioner repeatedly mischaracterizes the nature of this litigation to advance its theory, never raised below, that respondent pursued and lost a mythical long-shot primary claim. The judgment of the District Court on the merits elaborates what petitioner seeks to conceal—the true nature of the proceedings below. Respondent sued for sexual harassment and sex discrimination—she claimed to have been subjected to an abusive, hostile environment because of her gender, and to have been demoted because of her gender, and prevailed on both of those claims at trial. Because she eventually resigned under the burden of sexual harassment and demotion, respondent also claimed the unlawful conduct was sufficient to constitute a constructive discharge. Although the trial court found petitioner's unlawful conduct insufficiently severe to establish a constructive discharge, it was that same conduct which formed the basis of the successful claims for sexual harassment and discriminatory demotion. Respondent's assertion of constructive discharge rested upon the identical evidence as her successful claims of sexual harassment and discriminatory demotion. Had respondent pursued only her successful claims for sexual harassment and discriminatory demotion, the court would have heard the same evidence; her claim of constructive discharge bore only upon relief, affecting the duration of her backpay award.

With a degree of candor absent here, petitioner conceded below that the claims for sexual harassment and discriminatory demotion were "interlocking and inter-

twined" with the claim for constructive discharge. Brief of Petitioner Before the Court of Appeals, at 51. Petitioner is bound by that concession below, and cannot now assert otherwise by labeling the constructive discharge an unrelated "long-shot claim."

C. The Court of Appeals Properly Reviewed the Fee Award Reasonably Adjudicated by the District Court Under a Properly Stated Rule of Law.

Because the three claims turned on identical evidence, *Hensley* provided the framework for resolving the fee dispute. Both the magistrate judge and the District Judge independently applied *Hensley*, made detailed findings of fact, and concluded that the fees were reasonably incurred in proving sexual harassment and a discriminatory demotion. The court of appeals reviewed that conclusion for abuse of discretion and affirmed. Respondent now seeks further review of that discretion. The Court should decline the invitation for two reasons: 1) The Court should not exercise its discretionary jurisdiction to review the routine application of discretion under established law by a District Court, and 2) The District Court reasonably exercised its discretion under *Hensley* in light of petitioner's litigation tactics below.

The Court's rules discourage the use of certiorari jurisdiction to review factual findings or to review the claimed misapplication of a properly stated rule of law, yet that is precisely what petitioner seeks. Within the three tiers of the federal judiciary, responsibility for reviewing the trial court's exercise of discretion rests with the Court of Appeals. The Court of Appeals exercised that responsibility, characterizing petitioner's limited argument before it, never advanced in oral argument, as insufficient to "warrant discussion." The extensive

opinions of the trial judge and magistrate judge plainly show that both were apprised of and sought to apply properly stated law, and that they discharged that responsibility with studied care. Because the Court does not sit as a general court of errors, further review of that exercise of discretion is inappropriate under the Court's discretionary jurisdiction. *City of Riverside v. Rivera*, 477 U.S. 561, 581-586 (Powell, J., concurring in the judgment).

Petitioner fails altogether to acknowledge its role in driving up fees through its litigation tactics below. Its rejected settlement proposal foreshadowed its approach. Warning of what would follow rejection, petitioner announced that it should try the case "to help us as to other pending cases, both with the trial experience we would gain *and the message that would be conveyed to the other plaintiffs.*" (emphasis added). The message petitioner sought to convey was plain enough—sue us and we will try to exhaust your resources. Accordingly, petitioner unwisely embarked upon a "scorched earth" defense. Petitioner forced respondent to defend twelve depositions, some of which lasted for two days. Petitioner contested every fact and sought to cobble together evidence that its discriminatory demotion of Respondent with a substantial loss in earnings was a voluntary lateral transfer, or, alternatively, discipline for poor performance. Petitioner succeeded in greatly expanding the scope and cost of this litigation, forcing the court to devote five trial days to its resolution.

Petitioner succeeded in its goal—by inflating the cost of litigation, it "conveyed" to prospective plaintiffs "the message" that it will fight meritorious litigation to the bitter end. In addition, it gained the trial experience its settlement offer insisted it desired for its counsel. But

having chosen that course, it should not turn to this Court for relief from its consequences. The courts below did no more than follow long settled law by compensating respondent for the substantial effort petitioner unreasonably forced her to undertake to establish her claims.

D. Petitioner Seeks to Undermine Clear Congressional Intent and Settled Case Law Governing Fee Awards in Title VII Claims for Backpay.

Congress enacted the fee shifting provisions that accompany Title VII to encourage effective enforcement of public policy, recognizing that the limited monetary relief available through backpay awards otherwise would discourage enforcement. Petitioner's objection to the disparity between backpay and the fee award is addressed to the wrong forum; congressional intent, recited in the many Title VII cases the Court has decided, is clear. Limiting fees to a proportion of backpay when Congress has limited monetary relief to backpay would plainly frustrate that intent. Moreover, it would encourage defenddants to engage in oppressive litigation tactics, forcing upon plaintiffs a Hobson's choice between inadequate compensation in unreasonable settlements and inadequate compensation in uncompensated litigation costs.

Limited fee awards undermine the twin goals of Title VII, first expressed in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), of eradicating unlawful discrimination and making whole its victims. The Court has repeatedly reaffirmed *Albemarle*. Petitioner's proposed rule of proportionality between backpay awards and fee awards undermines both policies—it reduces the incentive to voluntarily comply with Title VI, and it frustrates make whole relief by forcing victims of intentional discrimination to accept unreasonably low settlement offers or forego fee compensation.

The Court declined to adopt a rule of proportionality in litigation for claims seeking compensatory and punitive damages under 42 U.S.C. §1983 in *City of Riverside v. Rivera*, 477 U.S. 561 (1986). In suggesting the Court reconsider *City of Riverside*, petitioner ignores the critical difference in the two statutes—while section 1983 authorizes unlimited compensatory and punitive damages, Title VII limited monetary relief to equitable backpay, forbidding either compensatory or punitive damages. Thus, this case does not present an opportunity to reconsider *City of Riverside*, for this was not a claim for either compensatory or punitive damages. Moreover, the Civil Rights Act of 1991 makes the recurrence of the circumstances of this case—backpay for intentional discrimination substantially less than fees—unlikely to recur, since the Act now authorizes compensatory and punitive damages in addition to backpay.

Petitioner intentionally discriminated against respondent, and then inflated the cost of litigation. Under well established law, applied by the courts below, petitioner is responsible for that cost as part of the full compensation for its unlawful conduct. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

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November 11, 1993

BY TELECOPY

Robert E. Weisberg
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Coral Gables, Florida 33146

Re: *Franklin v. Health & Tennis Corporation of America, etc.* Case No. 92-1702-CIV-MARCUS

Dear Bob:

We have reviewed your November 10, 1993 settlement offer carefully, and agree fully that any communications pertaining to settlement are governed by the principals underlying Rule 408 of the Federal Rules of Evidence.

I think you will agree that your settlement offer, boiled down to essentials, takes the most liberal possible view of Ms. Franklin's sales capabilities (in conflict with the assessment of her strongest supporter, Steward Dansby, that she was good but not top shelf), and then values your chances of prevailing its 60%.

Bally has mixed feelings about settling this case. On the one hand, litigation has its costs, and the amounts at

stake here are relatively small, which points to a value of achieving a reasonable settlement. On the other hand, we cannot ignore the clear contradictions and inconsistencies in the testimony of Franklin and her witnesses. Mark Seaman's strength as a witness, and the fact that this case is before a Judge that Bally has respect for, Judge Marcus. These considerations, and the low amounts at stake, point to trying the case, because we believe we should win it and also to help us as to other pending cases, both with the trial experience we would gain and the message that would be conveyed to the other plaintiffs.

Bally has weighed these considerations, and have authorized us to pursue a settlement with you if one can be made on a basis that fairly reflects the risks and the small amounts at stake. I am authorized to offer $17,500.00 in settlement of this case, but I caution that this offer is premised on a settlement being reached before we are forced to spend a week's worth of time and resources next week in order to prepare the case for trial. If no agreement can be reached before those depositions begin next week, then this offer must be withdrawn.

Bob, I hope that you and Scott will give this offer careful consideration. As I indicated to you before, I truly believe this is your weakest case, compared to either Anne Remond or Cindy Watson, and that Bally has offered a fair settlement of the small-dollars case. I look forward to hearing from you, and encourage you to contact me by telephone if that will facilitate resolution of the case.

Sincerely yours,

/s/ Bart Bixenstine
Barton A. Bixenstine

BAB/def

cc: Bally's Health & Tennis Corporation